IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 89 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH
and
Hon'ble MR.JUSTICE D.A.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

COMMISSIONER OF INCOME-TAX

Versus

NARENDRA N. CHAUHAN

Appearance:

1. INCOME TAX REFERENCE No. 89 of 1988
MR AKIL KURESHI with MR MANISH R BHATT for Petitioner
MR BD KARIA with MR RK PATEL for Respondent

CORAM : MR.JUSTICE M.S.SHAH
and
MR.JUSTICE D.A.MEHTA

Date of decision: 11/10/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

In this reference at the instance of the revenue, the following question is referred for our opinion in respect of assessment year 1975-76 :-

"Whether, in law and on facts, the assessee is entitled to deduction of Rs.23,000/- in the computation of capital gain accrued to him on the transfer of the bungalow ?"

2. Mr Narandas J Chauhan purchased certain agricultural lands for Rs. 9,000/- on 3.7.1954. He threw the said property in his HUF on 27.1.1958. Thereafter the HUF of Mr Narandas J Chauhan, father of the assessee started construction on a piece of the said land and spent Rs.42,354/-. The assessee pressed for a partial partition which was effected on 15.10.1971. At that time, the total property of the HUF of Mr Narandas J Chauhan was valued at Rs.2,20,000/-. One-fifth share of the assessee came to Rs.44,000/-. Sub-plot No. 2 admeasuring 1347 sq.yards including the incompletely constructed bungalow fell to the lot of the assessee, but since the assessee's share in the HUF property at the time of partition had come to only Rs.44,000/-, the assessee was required to pay Rs.23,000/- more to the HUF of Mr Narandas J Chauhan for getting sub-plot No. 2 alongwith incompletely constructed bungalow which was valued at Rs.67,000/-. The assessee accordingly got sub-plot No. 2 alongwith the incomplete bungalow. The assessee sold the said property for Rs.1,42,000/- on 4.10.1974. The assessee worked out the capital gain at Rs.73,591/- as per the following calculations :-

Less : Cost prices		1,42,000
Land value	1,855	
Amount spent by HUF	42,354	
	44,209	
Add : Amount payable to HUF as per release deed	23,000	
Add : Amount paid to contractor	1,200	
	68,409	
	73,591	

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The Income-tax Officer allowed the claim of Rs.1,200/- paid to contractor, but rejected the claim for Rs.1,855/- being the proportionate cost of the land. The Income-tax officer also rejected the claim of deduction of Rs.23,000/- which the assessee had paid as the additional cost over and above the assessee's share in the HUF property at the time of partial partition. In appeal, the Appellate Assistant Commissioner allowed deduction of Rs.1,855/- in the computation of capital gains, but rejected the assessee's claim for deduction of Rs.23,000/- on the ground that payment of Rs.23,000/- by the assessee to the HUF of Mr Narandas J Chauhan was not a permissible deduction in view of the provisions of Section 49(1) of the Act, more particularly as the assessee had not made any improvement to the property which the assessee obtained at the time of partial partition.

The assessee carried the matter in appeal before the Tribunal and contended that the assessee had paid Rs.23,000/- to the HUF of Mr Narandas J Chauhan in respect of the additional interest in the property so as to become full owner of the property because at the time of partial partition the value of the property was put at Rs.67,000/- and since the assessee's share in the property of the larger HUF came to Rs.44,000/-, the assessee would not have got full ownership right in the property in question without paying the additional amount of Rs. 23,000/-. The Tribunal accepted the assessee's contentions and allowed the appeal holding that since the assessee had paid Rs.23,000/- for getting the additional interest in the property over and above the interest which the assessee got at the time of partial partition, that was the cost of acquisition to the assessee for the additional interest in the property. Hence, this reference at the instance of the revenue.

3. We have heard Mr Akil Kureshi, learned counsel for the revenue and Mr BD Karia, learned counsel for the respondent-assessee.

4. Mr Kureshi submitted that since the assessee got the land in question being Sub-plot No. 2 with incomplete construction thereon at the time of partial partition and ultimately sold the said property without making any improvement thereto, only the provision of Section 49(1)(i) was applicable which provides that where the capital asset became the property of the assessee on any distribution of assets on the total or partial

partition of a Hindu Undivided Family, the cost of acquisition of the assets shall be deemed to be the cost for which the previous owner of the property acquired it, as increased by the cost of any improvement of the assets incurred or borne by the previous owner or the assessee, as the case may be. Mr Kureshi submitted that the said provision read with the explanation thereto clearly provides that for the purpose of working out the capital gain earned by the assessee, the cost of acquisition of the land and the incompletely constructed bungalow to the HUF of Mr Narandas J Chauhan was required to be taken as the cost of acquisition which was only Rs.1,885/- being the value of one-fifth of the land alongwith Rs.42,354/-being the amount spent by the larger HUF of Mr Narandas J Chauhan and, therefore, Rs.44,209/- was the only cost of acquisition which was required to be considered while computing the capital gain made by the assessee at the time of selling the property in the year 1974. Mr Kureshi, therefore, submitted that the entire amount of Rs.23,000/- allowed by the Tribunal was required to be disallowed as not a single rupee out of that amount could be considered as cost of acquisition in the hands of the HUF of Mr Narandas J Chauhan.

5. In the alternative, Mr Kureshi submitted that even if the assessee's contentions were to be accepted that he had paid Rs. 23,000/- for getting the additional interest in the property over and above his share which the assessee obtained at the time of partial partition, the Tribunal erred in not considering that the assessee was entitled to have only proportionate cost of acquisition in the hands of the larger HUF as the cost of acquisition for that portion of the property which the assessee obtained at the time of partial partition. To explain the same, the learned counsel submitted that when the larger HUF offered to the assessee the property in question valued at Rs.67,000/- against the assessee's share worked out at Rs.44,000/- plus Rs. 23,000/- as consideration for the additional interest in the property, what the larger HUF really did was to give only two-third of the property in question to the assessee by way of the assessee's share in the property of the larger HUF and the assessee purchased the remaining one-third interest in the said property by paying Rs.23,000/-. In the context of the provisions of Section 49(1)(i), the cost of acquisition of the said two-third property to the larger HUF was two-third of Rs.44,000/- i.e. approximately Rs.29,800/and, therefore, even if the assessee's contentions were to be accepted, it would only mean that the assessee is entitled to take as the cost of acquisition in the hands of the larger HUF Rs.29,800/for

the two-third share in the property (under Section 49(1)(i)) plus Rs.23,000/- as the cost of acquisition of the remaining one-third interest in the property (under Section 48 of the Act).

Mr Kureshi, therefore, submitted that the cost of acquisition for the purpose of computing the capital gain in the hands of the assessee would have to be worked out on the aforesaid basis and the assessee cannot get deduction of the entire amount of Rs.23,000/-

6. On the other hand, Mr BD Karia, learned counsel for the respondent-assessee has submitted that the Tribunal has rightly allowed the entire claim of Rs.23,000/- as the cost of acquisition of the additional interest in the property over and above the interest which the assessee got by way of the assessee's share in the property of the larger HUF at the time of partial partition. It is submitted that the Appellate Assistant Commissioner had held that the value of the property allotted to the assessee at the time of partial partition was Rs.44,209/-. There never was any dispute about the said cost of acquisition in the hands of the larger HUF. The only substantial dispute raised by the Income-tax Officer was about the amount of Rs.23,000/which the assessee had admittedly paid for acquiring the additional interest in the property in question over and above the property allotted to the assessee at the time of partial partition. It is further submitted that the question referred to this Court for opinion is only in respect of the said amount of Rs.23,000/-.

Moreover, against the order of the Income-tax Officer allowing deduction to the tune of Rs.43,554/- as the cost of acquisition of the asset allotted to the assessee at the time of partial partition, the revenue had not made any grievance about the same at the hearing of the appeal before the Appellate Assistant Commissioner or before the Tribunal. Hence, it is not open to the revenue now to contend that in the hands of the larger HUF the cost of acquisition in respect of the interest which was allotted to the assessee at the time of partial partition was less than Rs.44,209/-.

7. Having heard the learned counsel for the parties, we are of the view that since at the time of partial partition the assessee was not entitled to get the entire property valued at Rs.67,000/as the assessee's share in the property of the larger HUF and since the entire amount of Rs.23,000/paid by the assessee to the larger HUF pertained to the additional interest in the property

i.e. interest in addition to the interest allottable to the assessee at the time of partial partition quantified at Rs.44,000/-, the Tribunal was right in allowing the said amount of Rs.23,000/- as cost of acquisition to the assessee for the additional interest under Section 48 of the Act. Obviously, this additional interest was not obtained by the assessee as a part of his share in the property of the larger HUF at the time of partial partition. The provisions of Section 49(1)(i) are applicable to only that portion of the property which the assessee got as the assessee's share in the property of the larger HUF and not in respect of the property or interest which was in excess of such share.

8. As regards the alternative contention of Mr Kureshi that if the assessee's contention is accepted, there could be modification in the cost of acquisition of the property in the hands of the larger HUF as the entire amount of Rs.44,209/- cannot be taken as the cost of acquisition in the hands of the larger HUF in respect of the interest which was allotted to the assessee at the time of partial partition. Though the argument is interesting, we are not inclined to consider the same as the said submission runs counter to the stand taken by the revenue at the time of assessment and also in the appeal which was filed by the assessee. In none of those proceedings or even before the Tribunal, the revenue had contended that the cost of acquisition in the hands of the larger HUF in respect of the interest allotted to the assessee at the time of partial partition was required to be calculated at any amount lower than the amount of Rs.44,209/- which was allowed by the authorities in favour of the assessee.

9. In view of the above discussion, we are of the view that the Tribunal was right in holding that the assessee was entitled to deduction of Rs.23,000/- in the computation of capital gain accrued to him as the cost of acquisition of the additional interest in the property in question over and above the interest which was allotted to the assessee as the assessee's share in the property of the larger HUF of Mr Narandas J Chauhan at the time of partial partition on 15.10.1971.

10. In view of the above, our answer to the question referred is in the affirmative i.e. in favour of the

assessee and against the revenue.

11. The reference accordingly stands disposed of with no order as to costs.

(M.S. Shah, J.)

(D.A. Mehta, J.)

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